

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KEVIN RICHARDSON,
aka DANIEL BEARD,

Plaintiff,

v.

UNITED STATES ATTORNEY FOR
UNITED STATES OF AMERICA,

Defendant.

Case No. 3:18-cv-00188-MMD-WGC

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Plaintiff's Application to Proceed in Forma Pauperis (IFP) (ECF No. 1) and initial filing, a motion to correct illegal sentence (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some

1 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 2 (quoting *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). A litigant need not “be
 3 absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
 4 335 U.S. 331, 339 (1948).

5 When a prisoner seeks to proceed without prepaying the filing fee:

6 [I]n addition to filing the affidavit filed [as described above], [the prisoner] shall
 7 submit a certified copy of the trust fund account statement (or institutional
 8 equivalent) for the prisoner for the 6-month period immediately preceding the filing
 of the complaint or notice of appeal, obtained from the appropriate official of each
 prison at which the prisoner is or was confined.

9 28 U.S.C. § 1915(a)(2). Notwithstanding the foregoing:

10 (1) ... [I]f a prisoner brings a civil action...[IFP], the prisoner shall be required to
 11 pay the full amount of a filing fee. The court shall assess and, when funds exist,
 collect, as a partial payment of any court fees required by law, an initial partial
 filing fee of 20 percent of the greater of --

12 (A) the average monthly deposits to the prisoner’s account; or

13 (B) the average monthly balance in the prisoner’s account for the 6-month period
 immediately preceding the filing of the complaint or notice of appeal.

14 (2) After payment of the initial partial filing fee, the prisoner shall be required to
 15 make monthly payments of 20 percent of the preceding month’s income credited to
 16 the prisoner’s account. The agency having custody of the prisoner shall forward
 payments from the prisoner’s account to the clerk of the court each time the amount
 in the account exceeds \$10 until the filing fees are paid.

17 28 U.S.C. § 1915(b)(1), (2).

18 Plaintiff has submitted a financial certificate, but it is not clear it is an authentic record
 19 from the institution. In addition, it does not allow the court to determine his average monthly
 20 deposits or his average monthly balance for the past six months. Therefore, his application is
 21 incomplete. While the court would ordinarily offer an inmate a chance to correct these deficiencies,
 22 Plaintiff does not state a claim upon which relief may be granted and it appears his action is filed
 23 in the wrong court, and the action should be dismissed.

24 **II. SCREENING**

25 **A. Standard**

26 “The court shall dismiss the case at any time if the court determines that ... the action or
 27 appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or
 28 (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §

1 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed IFP, whether or not the plaintiff is
 2 incarcerated. *See Lopez*, 203 F.3d at 1129; *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001)
 3 (per curiam).

4 In addition, “[t]he court shall review, before docketing, if feasible or, in any event, as soon
 5 as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from
 6 a governmental entity or office or employee of a governmental entity.” 28 U.S.C. § 1915A(a). “On
 7 review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the
 8 complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief
 9 may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.”
 10 28 U.S.C. § 1915A(b)(1)-(2).

11 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 12 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 13 28 U.S.C. § 1915A(b)(1) track that language. Thus, when reviewing the adequacy of a complaint
 14 under 28 U.S.C. § 1915(e)(2)(B)(ii) or 28 U.S.C. § 1915A(b)(1), the court applies the same
 15 standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th
 16 Cir. 2012). Review under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab.*
 17 *Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

18 In reviewing the complaint under this standard, the court must accept as true the
 19 allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts
 20 in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted).
 21 Allegations in pro se complaints are “held to less stringent standards than formal pleadings drafted
 22 by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks and citation
 23 omitted).

24 A complaint must contain more than a “formulaic recitation of the elements of a cause of
 25 action,” it must contain factual allegations sufficient to “raise a right to relief above the speculative
 26 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
 27 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
 28 cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* §

1 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state “enough facts to state a
2 claim to relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,
3 678 (2009).

4 A dismissal should not be without leave to amend unless it is clear from the face of the
5 complaint that the action is frivolous and could not be amended to state a federal claim, or the
6 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
7 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

8 Plaintiff did not file a complaint, but instead document styled as a motion to correct illegal
9 sentence pursuant to Nevada Revised Statute 176.555. Nevada Revised Statute 176.555 states that
10 the court may correct an illegal sentence at any time.

11 This is a state statute which provides a remedy for Nevada *state courts* to correct an illegal
12 sentence. It appears that Plaintiff has mistakenly filed his action in *federal court*. Moreover, the
13 motion does not actually state any cognizable grounds for concluding that his sentence was illegal.
14 Instead, he discusses his need to access some unspecified accounts, and makes vague references
15 to the President, the Supreme Court, and various media outlets.

16 Given that Plaintiff fails to state a claim upon which relief may be granted, and the
17 possibility that he seeks relief from the wrong court, this action should be dismissed.

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III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order: **DENYING** Plaintiff's IFP application (ECF No. 1), and **DISMISSING** this action.

Plaintiff should be aware of the following:

1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

DATED: May 1, 2018.



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE